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No. 83-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE C. ROGERS,

Petitioner,

v.

LOCKHEED-GEORGIA COMPANY and
AERONAUTICAL MACHINISTS LODGE 709
THE INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT LOCKHEED-GEORGIA COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondent Lockheed-Georgia Company ("Lockheed" hereinafter) disagrees with petitioner's statement of the issues presented for review. The following are the issues which Lockheed believes are presented for review:

1) Did the Court of Appeals fail to give any weight to the results of retroactive application of the statute of limitations on Petitioner?

2) Did the Court of Appeals give the proper weight to the inequity of applying different statutes of limitations to similar claims?

3) Should the Court of Appeals have applied a statute of limitations prospectively-only where the Court of Appeals found that it would defeat the purpose of this Court's ruling in *DelCostello v. International Brotherhood of Teamsters*, 103 S. Ct. 2281 (1983) to have done so and where the petition for a writ of certiorari does not challenge the ruling that the purpose of this Court's ruling would be so defeated?

4) Did *DelCostello v. International Brotherhood of Teamsters, supra*, create a new principle of law which would justify prospective-only application of the statute of limitations?

5) Should the Court's ruling in *DelCostello v. International Brotherhood of Teamsters, supra*, be applied retroactively?

LIST OF CORPORATIONS RELATED TO RESPONDENT LOCKHEED-GEORGIA COMPANY IN COMPLIANCE WITH RULE 28.1

Lockheed Corporation
Cadam Inc.
CSL Leasing Corporation
Dialog Information Services, Inc.
Guam Air Terminal Corporation
LDS Corporation
Lockheed Air Terminal, Inc.
Lockheed Air Terminal of New York, Inc.
Lockheed Air Terminal, S.A.
Lockheed Aircraft (Asia) Limited
Lockheed Aircraft (Australia) Pty. Limited
Lockheed Aircraft Deutschland GmbH
Lockheed Aircraft International, A.G.
Lockheed Aircraft International, Inc. (LAI)
Lockheed Aircraft International Limited (LAIL)
Lockheed Aircraft Service-International
Lockheed Aircraft Service Singapore Private Limited
Lockheed Canada Inc.
Lockheed Corporation (Int'l) S.A.
Lockheed Dataplan, Inc.
Lockheed Domestic International Sales Corporation II
Lockheed Electronics Company, Inc.
Lockheed Engineering and Management Services Company, Inc.
Lockheed Finance Corporation
FCL Credit Corporation
Lockheed Georgia International Services, Inc.
Lockheed International Limited Taiwan
Lockheed International Service and Investment Corporation
Lockheed Missiles & Space Company, Inc.
Lockheed Mortgage Corporation
Lockheed Overseas Capital N.V.
Lockheed Shipbuilding Company

Lockheed Space Operations Company
Lockheed Support Systems, Inc.
Lockheed Systems Company, Inc.
Lockheed Technical Enterprises Corporation
Lockheed Technical Services Company, Inc.
Lockheed Technology S.A.
Lockheed Western Export Company
Memrykord Limited
Murdock Engineering Company
Oklahoma Fueling Facilities Corporation
Star Reconveyance Corporation
Tricities Protective Services, Inc.
Tristar Parts, Ltd.
Colby Crane & Manufacturing, Inc.
Getex Inc.
Lockheed Electronics International Operations, Inc.
Lockheed Systems & Services Company, Inc.
Los Angeles Fueling Facilities Corporation
San Francisco Fueling Facilities Corporation
Utah Fueling Facilities Corporation
Puget Sound Bridge & Dry Dock Company, Inc.
Vega Aircraft Company
Arizona Fueling Facilities Corporation
CTL Corporation
Gulf Technology Systems Group (not fully formed)
Honolulu Fueling Facilities Corporation
(LAT selling stock)
Letlock Saudi Arabia Co. Ltd.
Lockheed-Arabia
Lockheed-Sait Electronics S.A. (dissol. pending)
Lockheed Technical Services (Malaysia) S.B.
Ocean Minerals, Inc.
Pacific Aerospace Corporation Limited
Panel Lock Homes (Phil.) Inc.
Portland Fueling Facilities Corporation
Reno Fueling Facilities Corporation
Transnational Housing Company

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STATEMENT OF THE CASE

Lockheed adopts the statement of the case of Respondent Aeronautical Machinists Lodge 709 in its Brief In Opposition To Petition For Writ of Certiorari.

Lockheed disagrees with one section, in particular, of Petitioner's statement of the case. Page 12 of the peti-

tion seems to state that the Fifth Circuit held in *Sanderson v. Ford Motor Company*, 483 F.2d 102, 114 (5th Cir. 1973) that statutes of limitations for personal injury actions were to be applied to breach of collective bargaining agreement—breach of the duty of fair representation actions such as this one. However, the Fifth Circuit in the *Sanderson* case did not so hold. The case merely indicated that the Alabama statute of limitations for personal injury was the most appropriate to apply to an Alabama case. Neither *Sanderson* nor any other Fifth Circuit case ever held that statutes of limitations for personal injury were the appropriate ones to apply to all states or that the Georgia statute of limitations for personal injury was the appropriate statute to apply to cases of this type arising in Georgia.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit considered all of the factors mandated by this Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Although Petitioner criticizes the court below for not giving sufficient consideration to the individual facts of Petitioner's case in weighing the equities, the balancing of the equities was proper here. The Court of Appeals found the decisive factor to be that the application of different statutes of limitations to similar claims based upon geographic location was inequitable. This was entirely in keeping with the requirement of the *Chevron* decision that the equities be considered. Further, there is nothing in the individual facts of petitioner's case which singles it out for prospective-only application of the statute of limitations.

The Petition should also be denied because, even assuming that the third part of the *Chevron Oil Co. v. Huson* test was misapplied by the Court of Appeals, Petitioner failed to meet the first two parts of that test, and all three parts must be met before the courts will take the unusual step of applying a decision prospectively-only.

The result reached by the Court of Appeals here is the same result which this Court reached in *DelCostello v. International Brotherhood of Teamsters*, 103 S. Ct. 2281 (1983) and which has been reached by numerous other courts of appeals (with only one court of appeals taking a different approach). The decision herein, therefore, is not worthy of review on a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit Considered All Of The Factors Mandated By The Decision In *Chevron Oil Company v. Huson* In Applying The Statute Of Limitations Retroactively In This Case

This court determined in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) that a three-part test should be applied to determine whether or not the general rule that decisions are to have a retroactive effect is to be applied in a particular case. Under the *Chevron* decision, the three prongs of the test are: (1) "the decision to be applied nonretroactively must establish a new principle of law"; (2) whether the purpose of the rule will be furthered or retarded by retroactive application; and (3) "the inequity imposed by retroactive application . . . ." *Chevron Oil Co. v. Huson*, 404 U.S. at 106-107. The Petition here is based upon the argument that the Court of Appeals incorrectly applied the third prong of the *Chevron* test. (Petition, pp. 15-31).

It is undisputed that the Court of Appeals applied all three parts of the *Chevron* test. With regard to the third part, the balancing of the equities, the Court of Appeals found that "prospective application of *DelCostello* would cause inequitable results." (A-1, p. 10). The only criticism in the Petition of the Eleventh Circuit's consideration of the equities is the claim that the Court did not "consider the interests of the individual parties involved." (Petition, p. 25). However, the opinion does not state or otherwise indicate that the facts of Mr.

Rogers' particular case were not considered by the Court. Portions of the opinion discuss the pertinent facts of Mr. Rogers' case. (A-1, p. 2). All that the opinion can be considered to demonstrate is that factors of a broad-ranging nature prevailed in the balancing of the equities. The Court held that it would be inequitable to apply different statutes of limitations to essentially similar claims based purely on the geographic location in which the federal cause of action arose. (A-1, pp. 10-11). This, Lockheed submits, is sound analysis. The analysis is contrary to nothing in *Chevron* or in any other decision, and it certainly raises no issues worthy of consideration by this Court on a writ of certiorari.

Further, although the Petition is based almost solely upon the absence of an articulation of consideration of the specific facts of Petitioner's individual case, those facts do not mandate a different result. The only specific fact which Petitioner points to in his case which he says should have produced a different ruling was the fact that his lawsuit was initiated some time before the *DelCostello* decision was announced. This does not significantly differentiate his case from any other case in which application of the *Chevron* standard would be appropriate. Unless a rule was announced after a case arose, there would be no point in even considering prospective-only application of the rule. Although Petitioner places some emphasis on the length of time between when his alleged cause of action arose and when the *DelCostello* decision was announced, this period of time was no greater than the similar period involving plaintiff Flowers in the *DelCostello* decision[1] (Petition, p. 21), to whom the same statute of limitations was retroactively applied. *See* 103 S. Ct. at 2286, 2294. Thus, Petitioner has cited no facts which indicate that his case

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[1] The Flowers case, *United Steelworkers v. Donald C. Flowers*, 103 S. Ct. 2281 (1983) was consolidated with the *DelCostello* case and decided in the same opinion.

was extraordinary or that it deserved to be treated differently from other cases where the retroactive application of the *DelCostello* decision was involved. Even if it is assumed that the Eleventh Circuit should have given more consideration to the individual facts of Petitioner's case, the result would have been the same.

II. The Petition Should Not Be Granted Because Even If The Court Of Appeals Improperly Applied The Third Prong Of The *Chevron Oil Company v. Huson* Test, Petitioner Failed To Meet The First Two Prongs Of That Test

When a party is seeking to avoid retroactive application of a decision, "[a]ll three of the factors listed in *Chevron Oil* must be shown to favor prospective-only application before a decision will be denied retroactive effect." *Cochran v. Birkel*, 651 F.2d 1219, 1223 N. 8 (6th Cir. 1981), *cert. denied*, 454 U.S. 1152 (1982), *quoting Valencia v. Anderson Brothers Ford*, 617 F.2d 1278, 1288-1289 (7th Cir. 1980), *rev'd. on other grounds*, 452 U.S. 205 (1981). Accordingly, assuming that Petitioner satisfied the third part of the *Chevron* test, he still would not be able to prevail unless he established that a new principle of law had been applied to him and that the purpose of the new rule would not be retarded by prospective-only application.

The Court of Appeals found that failure to apply *DelCostello* retroactively "would retard rather than further the federal interest in prompt resolution of labor disputes." (A-1, p. 10). The Petition for Certiorari does not give any reason why this decision by the Court of Appeals was incorrect and it clearly was proper. Thus, Petitioner failed to satisfy the second part of the *Chevron* test.

Further, Petitioner failed to satisfy the first part of the *Chevron* test. Although the Court of Appeals assumed, without deciding, that *DelCostello* announced a

new principle of law, Petitioner did not carry his burden in this regard. The state of the law concerning the statute of limitations at the time that the alleged cause of action in this case arose was a "legally chaotic situation" in which there was no clear rule. *Lawson v. Truck Drivers*, 698 F.2d 250, 254 (6th Cir.), *cert. denied*, 104 S. Ct. 69 (1983); *Perez v. Dana Corp.*, 718 F.2d 581 (3d Cir. 1983). Although the Petitioner claimed to have relied on the statute of limitations found in Ga. Code Ann. § 3-1004 (1975) (*see* Appellee's Response To The Opinions Rendered in *DelCostello* and *Hand* As They Apply To The Instant Action, p. 5—filed in the court below) he was unable to cite any decision of any court which held that the statute was the appropriate statute of limitations for cases of this type arising in Georgia.

Thus, Petitioner failed to satisfy both the first and second parts of the *Chevron* test. Since he was required to satisfy both parts before he could establish that the retroactive application of the statute of limitations was improper, Petitioner would not be entitled to prevail even if he demonstrated that the Court of Appeals erred in balancing the equities.

III. The Eleventh Circuit Was Correct In Applying The Six Month Statute Of Limitations Retroactively To This Case

In *DelCostello v. International Brotherhood of Teamsters*, 103 S. Ct. 2281 (1983), this Court applied the six-month statute of limitations retroactively to the parties before it under facts which were similar in all relevant respects to the facts in this case. The Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have all either applied the six-month statute of limitations retroactively or indicated that they would do so. *See Assad v. Mount Sinai Hospital*, 725 F.2d 837, 838 (2d Cir. 1984); *Perez v. Dana Corp.*, 718 F.2d 581, 588 (3d Cir. 1983); *Murray v. Branch Motor Express Co.*, 723 F.2d 1146, 1148 (4th Cir. 1983); *Edwards v. Sea-*

Land Service, Inc., 720 F.2d 857, 862-63 (5th Cir. 1983); *Curtis v. International Brotherhood of Teamsters, Local 299*, 716 F.2d 360, 361 (6th Cir. 1983); *Storck v. International Brotherhood of Teamsters, Local Union No. 600*, 712 F.2d 1194, 1196 (7th Cir. 1983); *Lincoln v. District 9 of the International Association of Machinists*, 723 F.2d 627 (8th Cir. 1983); and *Hand v. International Chemical Workers Union*, 712 F.2d 1350, 1351 (11th Cir. 1983). In addition to the Eleventh Circuit, the Third and Fifth Circuits have specifically considered the question of retroactivity and have held that the statute of limitations is to be applied retroactively. *See Perez v. Dana Corp.*, 718 F.2d at 588; *Edwards v. Sea-Land Service, Inc.*, 720 F.2d at 862-863. Only the Ninth Circuit has held to the contrary. *See Edwards v. Teamsters Union, Local 36*, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1599 (1984).

Even if the *DelCostello* decision itself is not considered to have completely disposed of this matter, the weight of authority clearly supports retroactive application of the statute of limitations and review of the Eleventh Circuit's action in this case is therefore inappropriate.

CONCLUSION

The petition for writ of certiorari should be denied.

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